MAN WOLFFKRAN GmbH v Tenzin Corp (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–900 OF 2005
KANG HWEE GEE J
10 JULY 2008

Civil Procedure — Limitation of action — Contract — Counterclaim — Accrual of cause of action — Action commenced more than six years after cause of action arose — Whether counterclaim statute barred — Whether limitation period accrued from date of breach — When actual breach arose — Limitation Act 1953 s 6

This was an appeal against the decision of the senior assistant registrar who had disallowed the defendant's application under O 14A of the Rules of the High Court 1980 to determine on a point of law whether the period of limitation had set in on the defendant's counterclaim for damages arising out of the alleged breach of contract by the plaintiff in failing to supply the tower crane that the defendant had ordered from the plaintiff with the right specifications. The defendant ordered the crane on 4 November 1997. The plaintiff had, in November 1997, supplied the defendant with a crane which was not in accordance with the requisite specifications in that the jib was five meters short. The defendant contended that the last letter dated 1 February 2002 should be the starting point from which the period of limitation was computed as it constituted the last admission and acknowledgement of the plaintiff's obligation to deliver. The period of limitation had therefore not set in as the defence and counterclaim was filed on 20 September 2005 — well within the period of the six-year limitation. The plaintiff in opposing, contended that the defendant should not be allowed its counterclaim as the starting point of the period of limitation was from November 1997, being the date of delivery of the crane to the defendant.

Held, allowing the appeal with no order as to costs:

(1) Contemporary documents in the form of the correspondence entered into between the parties following the failure of the plaintiff to deliver the remaining five meters of the jib indicated that the parties had agreed 'to modify' their obligations by the willingness of the plaintiff to supply the remaining five meters of the jib at a later date with certain conditions (see para 8).

(2) Rightly therefore, the accrual of the cause of action should begin only when it became clear and obvious that the plaintiff would not be supplying the defendant the outstanding jib. This period would have to be after the date of the letter dated 1 February 2002, where the willingness of the plaintiff to compromise on its failure to supply the jib was kept alive (see paras 8–9).

(3) It followed therefore the period of limitation of six years under s 6 could only have set in after the date of the said letter. The defendant's counterclaim was therefore perfectly within the limitation period (see para 8).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan penolong kanan pendaftar yang tidak membenarkan permohonan defendan di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 untuk penentuan di atas dasar perundangan sama ada tempoh had masa telah berlaku di dalam tuntutan balas defendan untuk ganti rugi yang timbul daripada kemungkiran kontrak yang didakwa di dalam kegagalan untuk membekalkan kren menara yang telah dipesan oleh defendan daripada plaintif dengan spesifikasi yang sebenar. Defendan telah memesan kren tersebut pada 4 November 1997. Plaintif telah, sekitar November 1997, membekalkan defendan dengan kren yang mana tidak mengikuti syarat spesifikasi yang mana jib adalah lima meter pendek. Defendan menegaskan bahawa surat terakhir yang bertarikh 1 Februari 2002 seharusnya titik permulaan tempoh had masa yang dikira yang mana ianya menjadi penerimaan dan pengakuan terakhir tanggungjawab plaintif untuk dipenuhi. Tempoh had masa oleh itu tidak bermula yang mana pembelaan dan tuntutan balas telah difailkan pada 20 September 2005 — sebaiknya di dalam tempoh enam tahun had masa. Plaintif dalam menentang, menegaskan bahawa defendan seharusnya tidak dibenarkan tuntutan balasnya yang mana titik permulaan tempoh had masa adalah daripada November 1997, iaitu tarikh penghantaran kren kepada defendan.

Diputuskan, membenarkan rayuan tanpa perintah terhadap kos:

(1) Dokumen-dokumen kontemporari, dalam bentuk surat menyurat di antara pihak-pihak diikuti dengan kegagalan plaintif untuk menghantar baki lima meter jib menunjukkan bahawa pihak-pihak telah bersetuju 'untuk mengubah suai' kewajipan mereka dengan kesanggupan plaintif untuk membekalkan baki lima meter jib tersebut pada tarikh kemudiannya dengan syarat-syarat tertentu (lihat perenggan 8).

(2) Oleh itu sebenarnya, kausa tindakan berlaku seharusnya bermula hanya apabila ia menjadi terang dan jelas bahawa plaintif tidak membekalkan defendan jib yang belum dihantar. Tempoh ini seharusnya selepas tarikh surat yang bertarikh 1 Februari 2002, yang mana kesanggupan plaintif untuk bertolak ansur atas kegagalannya untuk membekalkan jib diteruskan (lihat perenggan 8–9).

(3) Oleh itu adalah diikuti tempoh had masa enam tahun di bawah s 6 hanya bermula selepas tarikh surat tersebut. Tuntutan defendan oleh itu betul-betul di dalam tempoh had masa (lihat perenggan 8).]

Notes

For cases on contract, limitation of action, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4650–4651.

Cases referred to

Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (refd)
Tengku Ismail bin Tengku Sulaiman (suing as father of Tengku Iskandar Shah bin Tengku Ismail, deceased) & Ors v Sia Cheng Soon & Anor [2006] 5 MLJ 228 (refd)
Wee Tiang Teng v Ong Chong Hooi & Anor [1978] 2 MLJ 54 (refd)

Legislation referred to

Limitation Act 1953 s 6
Rules of the High Court 1980 O 14A

Wajdi Mohamad (Zaid Ibrahim & Co) for the plaintiff.
Max Yong Boon Swee (Kiru & Yong) for the defendant.

Kang Hwee Gee J: This is my oral judgment (ex tempore):

[1] This is an appeal from the decision of the senior assistant registrar in disallowing the defendant's application under O 14A of the Rules of the High Court 1980 to determine on a point of law whether the period of limitation has set in on the defendant's counterclaim for damages arising out of the alleged breach of contract by the plaintiff in failing to supply the tower crane it ordered from the plaintiff with the right specifications.

[2] The crane was ordered by the defendant on 4 November 1997. It is admitted by the parties that the plaintiff had supplied the defendant with a crane which was not in accordance with the requisite specifications in that the jib was five meters short. After the delivery the parties entered into correspondence in attempting to settle their dispute.

[3] The plaintiff relied on five letters to prove the point that the parties were discussing and negotiating on the delivery of the remaining five meters of the jib. The last letter from the plaintiff to the defendant was dated 1 February 2002. The letter reads as follows:

MAN WOLFFKRAN GmbH

Telefax-No. 0060-3-56325498 Copy
MAN WOLFFKRAN Singapore Branch, Sophie

To: Tenzin Corp. (Malaysia) Sdn Bhd

Attn: Mr Eric Ch'ng

Our ref.: W-1/Anette Blessing

Phone: +49-7131-9815-335

Fax: +49-7131-9815-355

Date: 01.02.02

Total pages: 1

Agreement dtd. 19.10.2000

Tower Crane WK 135 EC

Dear Mr. Ch'ng,

Reference is made to your telefax dtd. 25.01.2002.

Please note that we will not discuss any more to take back the WK 135 EC. It is now more than 1 year since an Agreement was signed where the outstanding amount and the parts which were to be redelivered was fixed.

Your condition to pay us the first instalment once we agreed to take back the WK 135 EC is not acceptable for us. The only result is that we do not get our money which we normally had received in total since months if you had paid us the monthly instalments as agreed on 19.10.00.

Please be informed that we intend to travel to Singapore in week 8 (19.02.–22.02.). We propose to meet in Kuala Lumpur. We expect to receive the first instalment during our visit.

If we come to an amicable solution we are also ready to discuss the outstanding issues such as jib extension for WK 280 EC.

With kind regards

MAN WOLFFKRAN GmbH

Sgd	Sgd
.....	.....
Dorzbach	Blessing

[4] The defendant contends that this last letter should be the starting point from which the period of limitation is computed as it constitutes the last admission and acknowledgement of the plaintiff's obligation to deliver. The period of limitation has therefore not set in as the defence and counterclaim was filed on 20 September 2005 — well within the period of limitation of six years.

[5] The application is opposed by the plaintiff who contends that the defendant should not be allowed its counterclaim as the period of limitation has set in computing the starting point of the period of limitation from November 1997 being the date of delivery of the crane to the defendant.

[6] The parties had agreed in the course of the trial of the plaintiff's claim that this issue of limitation be determined on a summary basis to bind the parties with respect to the defendant's counterclaim.

Encik Wajdi Mohamad for the plaintiff: (verbatim)

(1) Refer to defendant's counter-claim para 10 under the particulars of damages. Under this paragraph the defendant is claiming for damages in terms of rental for replacement tower crane from the date of 1 January 1998 until 31 August 2005. We submit that by claiming damages from 1 January 1998 it is to be implied that the defendant had admitted that the breach had in fact arose from that date if not from November 1997.

(2) Refer to letter of the plaintiff dated 1 February 2002 above — we submit that this letter does not expressly indicate that it had acknowledged its liability or responsibility to the alleged claim in accordance with s 26(2) of the Limitation Act 1953 which read as follows:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:

A Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder of the rent or interest then due, but any payment of interest shall have effect, for the purposes of this subsection only, as if it were a payment in respect of the principal debt.

B It is clear that the letter was not an acknowledgement of the defendant's claim but only indicated that the plaintiff was prepared to listen to the defendant's complaint with respect to the short supply of the jib.

C (3) In this letter and other negotiations that took place during that material time the claim of the plaintiff was not quantified. Therefore in law I humbly submit that the plaintiff cannot be deemed to have acknowledged the plaintiff's claim. See *Wee Tiang Teng v Ong Chong Hooi & Anor* [1978] 2 MLJ 54 — acknowledgement of a claim made against the plaintiff must be quantified in figure or it must be liquidated in the sense that it is capable of ascertainment by calculation or by extrinsic evidence without the agreement of the parties.

D

E (4) The plaintiff in its reply and defence to the defendant's counterclaim stated that in November 1997 when the defendant ordered the tower crane the plaintiff had delivered a tower crane with 65 meters jib and told the defendant that the jib measuring 70 meters was not available and had to be reconstructed. The F plaintiff also advised the defendant that the reconstruction can be carried out in Malaysia using materials to be supplied by the plaintiff. As the defendant did not respond to this proposal until the plaintiff had commenced this action and the defendant had filed its counter-claim, we submit that the defendant had agreed to G accept the tower crane with slight variation of the 65 meters jib.

Encik Max Yong for the defendant (verbatim):

(1) See *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ H 141 — parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided. In our case there was non-delivery and parties had sat down to discuss I a solution for the delivery of the remaining jib and as such time taken for the negotiation for the delivery of the jib is to be discounted and the accrual of the action then becomes a matter of correct construction.

(2) See *Tengku Ismail bin Tengku Sulaiman (suing as father of Tengku Iskandar Shah bin Tengku Ismail, deceased) & Ors v Sia Cheng Soon & Anor* [2006] 5 MLJ 228 — defence of limitation should not be used as a second line of defence such as in this case where it is pleaded as an alternative defence.

(3) The cause of action will only arise upon the plaintiff having expressed their refusal to deliver.

Reply by Wajdi Mohamad (verbatim):

(1) In *Sia Siew Hong*, the subject matter was a guarantee agreement as what has rightly been decided in that case, the court will look at the nature of the contract to determine as to when the time begins to run or to breach. Therefore the plaintiff submits that the nature of contract for the sale of tower crane in the present case does not exclude the general rule that the cause of action accrues from the date of the breach which was in November 1997.

(2) In *Tengku Ismail*, the principle held in that case as pointed by my learned friend cannot be applied in this case because in the case of *Tengku Ismail* the defendant did not raise the limitation issue at all in their defence but only raise the issue for the first time in the submissions at the completion of the trial.

(3) Considering that the counter-claim by the defendant is for the damages that arise from 1 January 1998 the defendant cannot go against its own pleading to say that the limitation period has not set in. In the event the counter-claim of the defendant is allowed to continue how will the defendant quantify the damages that it is claiming from that date which is 1 January 1998.

FINDINGS AND DECISION

[7] In an action for breach of contract the period of limitation accrues from the date of the breach. But as Gopal Sri Ram JCA observed in *Sia Siew Hong*:

> … parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided.

[8] Contemporary documents in the form of the correspondence entered into between the parties following the failure of the plaintiff to deliver the remaining five meters of the jib indicate that the parties were agreed 'to modify' their obligations by the willingness of the plaintiff to supply the

remaining five meters of the jib at a later date with certain conditions. Rightly therefore the accrual of the cause of action should begin only when it becomes clear and obvious that the plaintiff would not be supplying the defendant the outstanding jib. This period would have to be after the date of the letter dated 1 February 2002, where the willingness of the plaintiff to compromise on its failure to supply the jib was kept alive. It follows therefore the period of limitation of six years under s 6 could only have set in after the date on this letter. The defendant's counterclaim was therefore perfectly within the limitation period.

[9] The plaintiff's submission that the period of limitation should start from the date of delivery or alternatively from the date the defendant claims damages is plainly untenable for it ignores the principle that the date of accrual of a cause of action in contract always begin from the date of the breach.

[10] The plaintiff's defence of limitation must therefore fail. The appeal is allowed with no order as to costs. As agreed damages is to be assessed by the registrar. The stay of execution ordered by the court pursuant to the consent judgment entered on 26 July 2007 granting judgment to the plaintiff is to be stayed until the disposal of the defendant's claim and the amount set off against the plaintiff's claim.

Appeal allowed with no order as to costs.

Reported by Ashgar Ali Ali Mohamed